

**UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD**

2010 MSPB 5

Docket No. SF-3443-09-0256-I-1

**Werner Bambl,
Appellant,
v.
Department of the Treasury,
Agency.**

January 8, 2010

Werner Bambl, Clovis, California, pro se.

Jill S. LeBeau, Esquire, San Francisco, California, for the agency.

BEFORE

Susan Tsui Grundmann, Chairman
Anne M. Wagner, Vice Chairman
Mary M. Rose, Member

OPINION AND ORDER

¶1 The appellant has filed a submission challenging an initial decision (ID) that dismissed his appeal as withdrawn. For the reasons set forth below, we VACATE the initial decision and DISMISS the appeal for lack of jurisdiction.

BACKGROUND

¶2 The appellant is a Tax Examiner with the Internal Revenue Service in Fresno, California. Initial Appeal File (IAF), Tab 1 at 4-5. On January 28, 2009, he filed a pro se Board appeal to challenge a lowered annual performance evaluation that was issued by the agency on January 20, 2009. *Id.* at 3, 5. On his

appeal form, the appellant indicated that he had filed a grievance on January 23, 2009, which was pending resolution. *Id.* at 4. The administrative judge (AJ) issued an acknowledgment order that ordered the appellant to establish that the Board has jurisdiction over his appeal. IAF, Tab 2. On February 23, 2009, the agency moved to dismiss the appeal for lack of jurisdiction. IAF, Tab 5 at 2-3.

¶3 The AJ held a telephonic preliminary status conference on March 3, 2009, during which the appellant voluntarily withdrew his appeal. ID at 2, 8; IAF, Tab 7. On the same day, the AJ issued an ID dismissing the appeal with prejudice based upon the appellant's voluntary withdrawal. ID at 1-2. The ID indicated that it would become final on April 7, 2009, unless a PFR was filed by that date or the Board reopened the matter on its own motion. ID at 2.

¶4 On August 27, 2009, the appellant filed a new appeal form with the Western Regional Office to challenge his lowered performance evaluation. Petition for Review File (PFRF), Tab 1 at 5-7. The Western Regional Office forwarded the appeal to the Clerk of the Board on the next day and it was docketed as a petition for review (PFR). *Id.* at 1. In this submission, the appellant alleges that he filed a grievance on February 27, 2009, and later received a Step 3 final decision on August 10, 2009.¹ *Id.* at 6-7.

¶5 The Clerk of the Board informed the appellant that his PFR appeared to be untimely because it should have been filed on or before April 7, 2009, and that the Board's regulations require untimely filed petitions to be accompanied by a motion to accept the petition as timely filed and/or to waive the filing time limit for good cause, and an affidavit or sworn statement showing the petition was timely or that there was good cause for the untimely filing. PFRF, Tab 2 at 1.

¹ Based on the record, it is unclear whether the appellant filed his Board appeal after he filed a grievance on the matter or vice versa. See PFRF, Tab 1 at 6, Tab 3 at 1, 4-6; IAF, Tab 1 at 4, Tab 5 at 2-3.

¶6 The Clerk enclosed a copy of the Board’s “Motion to Accept Filing as Timely and/or to Ask the Board to Waive or Set Aside the Time Limit,” and ordered the appellant to file his motion and an affidavit or sworn statement by September 15, 2009. *Id.* at 2. The appellant timely filed a sworn copy of his Motion to Accept Filing as Timely and/or to Ask the Board to Waive or Set Aside the Time Limit. He appears to argue that he thought the agency would consider his grievance on the merits, but after he withdrew his appeal it informed him in a Step 3 decision that his grievance was untimely and that he had made an election to pursue an appeal before the Board. PFRF, Tab 3. The agency has untimely responded in opposition to the appellant’s petition and submitted a sworn declaration to show good cause for accepting the late filing of its response pursuant to [5 C.F.R. §1201.114](#)(f)(2). PFRF, Tab 5.

ANALYSIS

¶7 Although the Clerk of the Board has regarded the appellant's submission as a PFR, it is generally appropriate to treat a request for reconsideration of an appellant-initiated dismissal of an appeal as a late-filed petition for appeal or as a request to reopen and reinstate a prior appeal. *Edwards v. Department of Veterans Affairs*, [111 M.S.P.R. 297](#), ¶ 5 (2009) (citing *Caracciolo v. Office of Personnel Management*, [86 M.S.P.R. 601](#), ¶ 3 (2000)). However, in this case, we need not address the appellant’s arguments in his August 27, 2009 submission because we find the Board lacks jurisdiction over his appeal.

¶8 The issue of the Board’s jurisdiction is always before the Board and may be raised by either party or sua sponte by the Board at any time during a Board proceeding. *Zajac v. Department of Agriculture*, [112 M.S.P.R. 160](#), ¶ 8 (2009). The Board's jurisdiction is not plenary; it is limited to those matters over which it has been given jurisdiction by law, rule or regulation. *Maddox v. Merit Systems Protection Board*, [759 F.2d 9](#), 10 (Fed. Cir. 1985); [5 C.F.R. § 1201.3](#)(a). An

appellant bears the burden of proving by preponderant evidence that his appeal is within the Board's jurisdiction. 5 C.F.R. § 1201.56(a)(2)(i).

¶9 The appellant alleged only that he was appealing his lowered performance evaluation. IAF, Tab 1 at 3-5; *see* PFRF, Tab 1 at 5-6. On the initial appeal form, he had the opportunity to assert other claims but instead checked the box for “No Additional Claims.” IAF, Tab 1 at 3-5. The Board generally lacks jurisdiction over appeals from performance appraisal ratings. *Wein v. Department of the Navy*, [37 M.S.P.R. 379](#), 381 (1988). The only bases on which the Board could have jurisdiction over such an appeal would be as an individual right of action (IRA) or a Uniformed Services Employment and Reemployment Rights Act of 1994 (codified at [38 U.S.C. §§ 4301-4333](#)) (USERRA) claim. The Board has jurisdiction over an IRA appeal if the appellant has exhausted his or her administrative remedies before the Office of Special Counsel and makes nonfrivolous allegations that: (1) He engaged in whistleblowing activity by making a protected disclosure, and (2) the disclosure was a contributing factor in the agency's decision to take or fail to take a personnel action. *Yunus v. Department of Veterans Affairs*, [242 F.3d 1367](#), 1371 (Fed. Cir. 2001). An individual may bring an IRA appeal claiming that the agency gave him a lowered performance evaluation in retaliation for his whistleblowing activity, *see* [5 U.S.C. §§ 1214\(a\)\(3\), 1221\(a\), 2302\(a\)\(2\)\(A\)\(viii\)](#); *Taylor v. Department of the Navy*, [101 M.S.P.R. 478](#), ¶ 8 (2006) (a performance appraisal is a personnel action under the Whistleblower Protection Act), but the appellant does not claim to be a whistleblower. *See* IAF, Tab 1 at 4-5; PFRF, Tab 1. To establish jurisdiction over a USERRA appeal under [38 U.S.C. § 4311\(a\)](#), an appellant must allege that: (1) He performed duty or has an obligation to perform duty in a uniformed service of the United States; (2) the agency denied him initial employment, reemployment, retention, promotion, or any benefit of employment; and (3) the denial was due to the performance of duty or obligation to perform duty in the uniformed service. *Hillman v. Tennessee Valley Authority*, [95 M.S.P.R. 162](#), ¶ 5

(2003). The appellant has not alleged that he performed or has a duty to perform uniformed service or that his lowered performance evaluation was due to any such service, and therefore the Board has no jurisdiction over this appeal under USERRA. *See* IAF, Tab 1 at 4-5; PFRF, Tab 1.

¶10 In the acknowledgment order, the AJ apprised the appellant that it did not appear that he had alleged an appealable action and ordered him to file evidence and argument to prove that the Board has jurisdiction over his appeal. IAF, Tab 2 at 2. However, the appellant did not respond. Thus, we find the Board lacks jurisdiction over this appeal and accordingly, we DISMISS it.²

ORDER

¶11 This is the final decision of the Merit Systems Protection Board in this appeal. Title 5 of the Code of Federal Regulations, section 1201.113(c) ([5 C.F.R. § 1201.113\(c\)](#)).

NOTICE TO THE APPELLANT REGARDING YOUR FURTHER REVIEW RIGHTS

You have the right to request the United States Court of Appeals for the Federal Circuit to review this final decision. You must submit your request to the court at the following address:

United States Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, DC 20439

The court must receive your request for review no later than 60 calendar days after your receipt of this order. If you have a representative in this case and your representative receives this order before you do, then you must file with the court

² In light of our disposition of this appeal, we need not determine whether the agency has shown good cause for the untimely filing of its response to the appellant's August 27, 2009 submission. *See Walker v. Department of Health and Human Services*, [111 M.S.P.R. 473](#), ¶ 9 (2009).

no later than 60 calendar days after receipt by your representative. If you choose to file, be very careful to file on time. The court has held that normally it does not have the authority to waive this statutory deadline and that filings that do not comply with the deadline must be dismissed. *See Pinat v. Office of Personnel Management*, [931 F.2d 1544](#) (Fed. Cir. 1991).

If you need further information about your right to appeal this decision to court, you should refer to the federal law that gives you this right. It is found in Title 5 of the United States Code, section 7703 ([5 U.S.C. § 7703](#)). You may read this law, as well as review the Board's regulations and other related material, at our website, <http://www.mspb.gov>. Additional information is available at the court's website, www.cafc.uscourts.gov. Of particular relevance is the court's "Guide for Pro Se Petitioners and Appellants," which is contained within the court's Rules of Practice, and Forms 5, 6, and 11.

FOR THE BOARD:

William D. Spencer
Clerk of the Board
Washington, D.C.